IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1142

Filed: 19 July 2016

Swain County, No. 13 CVS 102

COBURN SAWYER, JAMES MICHAEL CLAMPITT, JUNE HAGMAN, KURT HAGMAN, DAVID SAWYER, Plaintiff,

v.

THE ESTATE OF JOHN SAWYER, Mary S. Carter, Executrix, and MARY S. CARTER, individually, Defendant.

Appeal by Plaintiffs from order entered 6 March 2015 by Judge Alan Z. Thornburg in Swain County Superior Court and cross-appeal by Defendants from order entered 2 October 2015 by Judge Robert T. Sumner in Swain County Superior Court. Heard in the Court of Appeals 9 March 2016.

Jeffrey W. Norris & Associates, PLLC, by Jeffrey W. Norris, for Plaintiffs-Appellants.

Ridenour & Goss, PA, by Eric Ridenour, for Defendants-Appellees.

DILLON, Judge.

This is an action seeking money and real estate from the Estate of John Sawyer (the "Estate") and from the Estate's sole beneficiary Mary S. Carter ("Carter") brought by other relatives of John Sawyer (collectively referred to as the "Plaintiffs").

Plaintiffs appeal the Entry of Partial Summary Judgment against them on most of their claims (the "Summary Judgment Order"). Carter, both in her own right and as executrix for the Estate (collectively referred to as the "Defendants"), appeals the order denying Defendants' motion to dismiss Plaintiffs' appeal (the "Motion Order"). We affirm in part and reverse in part.

I. Background

In 1996, John Sawyer ("John") executed a will (the "1996 Will"), leaving his entire estate to his niece Carter, who was also designated executrix under the 1996 Will. At some point, John placed the 1996 Will in his bank safety deposit box.

In 2010, John traveled with his nephew, Plaintiff David Sawyer ("David"), to meet with an attorney ("Attorney Norris") about drafting a new will. David claims the following with respect to John's meeting with Attorney Norris: (1) his uncle told Attorney Norris that he wanted to divide his real property among his relatives, including Plaintiffs and Carter; (2) a crude map was drawn by hand which purportedly depicted John real estate divided into sections with a name of one of his relatives associated with each divided part (the "Map"); (3) John never mentioned his earlier 1996 Will during the meeting; and (4) David was unaware of the 1996 Will. However, John never executed a new will.

In 2012, John died. Following John's death, the 1996 Will was discovered in his bank safety deposit box. The 1996 Will was offered for probate. No caveat was ever filed challenging the validity of the 1996 Will.

In June 2013, Plaintiffs commenced this action asserting four claims against Defendants. Defendants filed an answer essentially denying the claims.[1]

In February 2014, Defendants moved for summary judgment on Plaintiffs' claims. Following a hearing on the matter, the trial court entered *partial* summary judgment in favor of Defendants on three of Plaintiffs' claims, but denied summary judgment as to a fourth claim for *quantum meruit*, leaving that claim open for trial.

In July 2014, Plaintiffs took a voluntary dismissal as to this fourth claim for *quantum meruit* and then filed their notice of appeal from the Summary Judgment Order.[2]

In August 2014, Defendants moved the trial court to dismiss Plaintiffs' appeal, contending that Plaintiffs had no right to appeal the summary judgment of their first three claims after taking a voluntary dismissal of their fourth claim. Following a

[1] Defendants did admit that the Estate was obligated to reimburse Plaintiff Coburn Sawyer $4,112.50 for a bill he had paid on behalf of John for nursing services received during the final months of John's life. Based on this stipulation by Defendants, the Summary Judgment Order does grant judgment in this amount to Coburn, which Defendants do not challenge on appeal.

[2] The parties assert in their briefs that Plaintiffs voluntarily dismissed their remaining claim in open court on 2 June 2015, though no transcript of this proceeding is in the record. The record before us does contain a Voluntary Dismissal Without Prejudice filed on 14 July 2015, which memorializes this oral dismissal.

hearing on the matter, the trial court denied Defendants' motion to dismiss Plaintiffs' appeal. Defendants cross-appeal from the Motion Order.

II. Analysis

A. Defendants' Cross-appeal

We first address Defendants' cross-appeal of the Motion Order. Specifically, Defendants argue that Plaintiffs have no right to appeal any prior orders rendered by the trial court once they have elected to take a voluntary dismissal. While Defendants' statement of the law is generally true, *Hous. Auth. v. Sparks Eng'g, PLLC*, 212 N.C. App. 184, 188, 711 S.E.2d 180, 182 (2011), this general rule does not apply where a partial summary judgment is *granted* against a plaintiff and plaintiff voluntarily dismisses his or her remaining claims in order to obtain immediate review of the partial summary judgment order. *Id.* at 188-89, 711 S.E.2d at 183. In such case, the voluntary dismissal of remaining claims renders the partial summary judgment a final order from which plaintiff may seek immediate appeal.[3] *Id.* *See also Combs & Assoc. v. Kennedy*, 147 N.C. App. 362, 367, 555 S.E.2d 634, 638 (2001) (stating that a "[p]laintiff's voluntary dismissal of this remaining claim . . . has the effect of making the trial court's grant of partial summary judgment a final order"). Accordingly, we affirm the Motion Order.

B. Plaintiffs' Appeal

[3] This assumes that no other party has any pending counterclaims or cross-claims which might prevent the partial summary judgment from becoming "final."

We now turn to Plaintiffs' appeal of the Summary Judgment Order against them.

Summary judgment is appropriate on any claim where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013). "When considering a motion for summary judgment, the trial judge must view the presented evidence in the light most favorable to the nonmoving party." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001).

III. Breach of Contract

In their breach of contract claim, Plaintiffs allege that John breached his promise to devise them certain tracts of real estate in his will in consideration for them providing for his care during his final months. We hold that the trial court correctly concluded that Plaintiffs' breach of contract claim must fail as a matter of law because the alleged contract does not satisfy the Statute of Frauds.

North Carolina's version of the Statute of Frauds states that "[a]ll contracts to sell or convey land . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized." N.C. Gen. Stat. § 22-2. The purpose of this law is well-grounded in good public policy:

> Land is the most important and valuable kind of property. Or if it be not, there is no other stake for which men will play so desperately. In men and nations there is an insatiable appetite for lands, for the defence or acquisition of which money and even blood sometimes are poured out like water. The evidence of land-title ought to be as sure as human ingenuity can make it. But if left in parol, nothing is more uncertain, whilst the temptations to perjury are proportioned to the magnitude of the interest.
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> The infirmities of memory, the death of witnesses, the corruptibility of witnesses, the honest mistakes of witnesses, and the misunderstandings of parties, these are the elements of confusion and discord which ought to be excluded from titles to the most coveted, if not most valuable of terrestrial objects. And it is the purpose of the statute of frauds and perjuries to exclude these elements, and to compel men to create testimonials of their intentions which are certain and enduring.

Powell v. City of Newton, 364 N.C. 562, 572, 703 S.E.2d 723, 730 (2010) (Martin, J. (now C.J.), concurring) (citation omitted). *See also Neal v. Wachovia Bank & Trust Co.*, 224 N.C. 103, 106, 29 S.E.2d 206, 208 (1944) (holding that "[a] contract to devise real estate is within the statute of frauds"); *Grantham v. Grantham*, 205 N.C. 363, 365-66, 171 S.E. 331, 332 (1933) (reaffirming the principle that the Statute of Frauds applies to contracts for the conveyance of real property).

Here, Plaintiffs argue that John's oral promise to devise them real estate in return for their care of him is evidenced by a writing which satisfies the Statute of Frauds, namely the Map. The Map purportedly depicts John's real estate divided into sections based on public and private roads and other landmarks. Within each

section appears a name or initials, which Plaintiffs claim represent how John wanted his property divided upon his death. However, assuming that the Map contains an adequate description of the real estate and otherwise does not run afoul of the Statute of Frauds for failure to recite the agreed-upon consideration or other terms of the contract, we hold that the Map fails as a matter of law because it lacks John's signature. N.C. Gen. Stat. § 22-2. (providing that in order for a writing to satisfy the Statute of Frauds, it must contain the signature of "the party to be charged therewith, or by some other person by him thereto lawfully authorized.") *See Hall v. Misenheimer*, 137 N.C. 183, 185, 49 S.E. 104, 105 (1904).

Here, John's name does not appear anywhere on the Map, much less his own signature. Plaintiffs, however, contend that there is a genuine issue of material fact as to whether the name "David" printed on the Map constitutes the requisite signature. Specifically, they argue that there is a genuine issue of fact as to whether the name "David" was written by David as his signature as his uncle's authorized agent. We hold that Plaintiffs' argument fails. Specifically, we hold as a matter of law that David did not write his first name "in such a manner as to authenticate the instrument as his act, or in other words, to show the intention of the party to admit his liability upon the contract." *Burriss v. Starr*, 165 N.C. 657, 660, 81 S.E. 929, 930 (1914). *See also McCall v. Institute*, 189 N.C. 775, 128 S.E. 349 (1925) (holding that nonsuit was appropriate where document relied upon by plaintiff indicated that

signer was executing as a witness to the document and not for the purpose of binding the defendant); *Yaggy v. B.V.D. Co.*, 7 N.C. App. 590, 597, 173 S.E.2d 496, 501 (1970) (holding that the affixation of a party's name to a telegram constituted a signature for the purposes of the Statute of Frauds). David admits in the verified complaint (the "Complaint") that the name "David" was written on the Map illustrating John's property for the purpose of depicting which section of land David was to receive in John's will. We note that the Complaint was verified by David himself. Indeed, the name "David" is printed on the Map in capital letters, just as the names of other relatives are printed within other sections of John's land on the Map. David's name does not otherwise appear on the Map. And there are no words on the Map to indicate that when David wrote "David," he was in effect *signing* the Map for his uncle. There is no evidence in the record that David placed his first name on the Map with the purpose or intent of him executing the Map on behalf of his uncle. We note that David is a licensed attorney. We must conclude, as a matter of law, that David printed his name on the Map for the purpose of depicting the property he was to receive and not for the purpose or intent of signing as agent for his uncle.[4]

[4] We note that Plaintiffs pleaded a cause of action for *quantum meruit* to recover the value of their services in caring for John, based on *Grantham v. Grantham*, 205 N.C. 363, 171 S.E. 331 (1933). In that case, our Supreme Court stated the following:

> The general rule is that, where services have been performed in consideration of a promise to devise real property, if the contract, as in the pending case, is not enforceable by reason of the Statute of Frauds, an action cannot be maintained on the special contract, but in case of

IV. Constructive Trust

The Constructive Trust claim involves a one-acre portion of John's property (the "Cemetery Tract"). The allegations in the Complaint state that Plaintiff Coburn Sawyer ("Coburn"), John's brother, transferred the Cemetery Tract to John with the understanding that John was holding it in trust for the entire family for use as a family cemetery. Additionally, the Complaint provides that John accepted the Cemetery Tract from his brother with the understanding that he would convey it to a family trust at some point in the future. In their answer, Defendants have denied that Carter has any obligation to transfer the Cemetery Tract into a trust, though Defendants further state that Carter intends to make the transfer.

Our Supreme Court has long recognized that a parol trust is enforceable against the legal holder of realty, even if there is no writing expressly creating the trust. *See Spence v. Foster Pottery Co.*, 185 N.C. 218, 220, 117 S.E. 32, 33 (1923). In *Spence*, the Supreme Court recognized that a parol trust may be enforceable even though the deed makes no mention that the conveyance was to be made in trust:

> There are certain parol trusts, and those created by operation of law, dealing with beneficial interests in lands, which are fully recognized in this jurisdiction. . . . And it has been held with us consistently that these trusts,

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> services performed it may be prosecuted on the theory of implied *assumptit* or *quantum meruit* to recover the value of the services rendered.

Id. at 367-68, 171 S.E. at 333-34. However, in the present case, Plaintiffs have voluntarily dismissed their *quantum meruit* claim.

> though resting in parol, or not evidenced by any writing, may be enforced against the holder of the legal title, unless it appear that such holder, or some one under whom he claims, has acquired his title for a fair and reasonable value and without notice of the trust.

Id. at 220, 117 S.E. at 33.

In the present case, we hold that there is a genuine issue of fact as to whether John held the Cemetery Tract in trust for the Sawyer family. We note that this issue does not appear to be one of great contention between the parties as Carter has expressed that she intends to convey the Cemetery Tract to a family trust. However, at this stage, Defendants have not admitted that the parol trust exists nor is there any evidence in the record indicating that Carter has, in fact, conveyed the Cemetery Tract to a family trust. Therefore, we reverse the Summary Judgment Order with respect to the Constructive Trust claim.

V. Declaratory Judgment

In their claim for Declaratory Judgment, Plaintiffs seek a determination regarding their rights in John's purported contract to devise his real estate to Plaintiffs. As we have held that Plaintiffs have no enforceable contract claim, we affirm the trial court's grant of summary judgment as to this claim.

AFFIRMED IN PART AND REVERSED IN PART.

Judges CALABRIA and DIETZ concur.

Report per Rule 30(e).